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QUESTIONS PRESENTED

1. Whether Respondent Sharon Dunnigan's sentence was lawfully enhanced two levels for obstruction of justice under Sentencing Guideline §3C1.1.

2. Whether Sentencing Guideline §3C1.1 has adequate safeguards to prevent an unconstitutional application to convicted defendants who have testified at trial.

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§3C1.1 ..... *passim*

Application Note 3 11

In the Supreme Court of the United States

OCTOBER TERM, 1992

NO.91-1300

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR SHARON DUNNIGAN

SUMMARY OF ARGUMENT

A. The sentence imposed by the district court was unlawfully enhanced due to the district court's failure to make independent findings of false testimony and apparent reliance upon a guilty verdict to impose an enhancement for obstruction of justice under Sentencing Guideline §3C1.1. The absence of specific findings and reliance on the jury verdict compelled the court of appeals to reverse the application of the enhancement as a "wooden or reflexive" formality prohibited by pre-guidelines

standards for punishing perjured trial testimony as found in *United States v. Grayson*, 438 U.S. 41 (1978).

B. The court of appeals properly declared that the imposition of the §3C1.1 enhancement was fret with application infirmities which unconstitutionally impinged the right to testify in one's own defense. Existing safeguards against the chilling effect on the defendant's right to testify are inadequate as exemplified by the application of the enhancement in this case where no specific findings of perjury were made and the logical reliance upon a guilty verdict renders judicial review meaningless.

ARGUMENT

SENTENCING GUIDELINE §3C1.1 WAS UNLAWFULLY APPLIED TO RESPONDENT SHARON DUNNIGAN DUE TO AN ABSENCE OF AN INDEPENDENT FINDING OF FACTS BY THE SENTENCING DISTRICT COURT.

The primary question[1] in this case is not whether the Constitution permits application of Sentencing Guideline §3C1.1 to a defendant who testifies falsely at trial, but whether the two level enhancement was unconstitutionally applied to Respondent Sharon Dunnigan without specific findings of fact, and therefore based substantially upon the jury verdict of guilty. The secondary issue presented to this Court for review of the Fourth Circuit Court of Appeals' decision is whether the enhancement can be applied to any defendant, guilty or innocent, without a chilling effect on the Fifth Amendment right of a defendant to testify in his or her own behalf.

A. Sentencing Guideline §3C1.1 was unlawfully applied to Respondent Dunnigan.

The court of appeals did not expressly declare §3C1.1 intrinsically unconstitutional[2] when used to enhance a sentence for obstruction of justice based upon false testimony. The Court was compelled to declare the application of the guideline unconstitutional because of the absence of adequate safeguards and the

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[1] The government identifies the issue in this case as one of whether an obstruction of justice enhancement for perjured testimony is constitutionally prohibited under Sentencing Guideline §3C1.1. Government Brief p. 11.

[2] But compare. The Fourth Circuit left no doubt in *United States v. Craigo*, 956 F.2d 65, 68 (4th Cir. 1992) that the obstruction of justice enhancement was *per se* unconstitutional in an instance where the district court made specific findings that the defendant's testimony was ludicrous and perjurious which the court of appeals found to be supported by the evidence. In Dunnigan's case, no such specific findings were made by the district court or reviewed by the court of appeals.

natural consequence is a chilling effect on the Fifth Amendment right to testify by observing at Pet. App. p. 14:

> We are not satisfied that there are enough safeguards in place to prevent this enhancement from unfairly coercing defendants, *guilty or innocent*, into remaining silent at trial. Other circuits have reviewed the district court's finding of untruthfulness under a 'clearly erroneous' standard. *United States v. Batista-Polanco*, 927 F.2d at 22; *United States v. Matos*, 907 F.2d at 276; *United States v. Wallace*, 904 F.2d at 605; *United States v. Beaulieu* 900 F.2d at 1540; *United States v. O'Meara*, 895 F.2d at 1220. Of course, in light of the jury's verdict of guilt, the district court's finding will never be 'clearly erroneous' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot. Our review of these enhancements would therefore be an empty ritual. [emphasis added]

The Fourth Circuit did not defy the longstanding precedent in *United States v. Grayson*, 438 U.S. 41 (1978), but distinguished the application of Sentencing Guideline §3C1.1 in this case from *Grayson* by first pointing out that a recognized goal of pre-guideline sentencing was rehabilitation while the guideline's purpose was to punish a defendant for an uncharged offense. The Fourth Circuit did not dispute that a sentencing court could consider a defendant's perjury at trial, as well as numerous other negative personal history characteristics, as indicative of his or her need for rehabilitation and an increased sentence within the statutory range was constitutionally permissible. The Fourth Circuit perceived the two level enhancement as both violative of the *Grayson* proscription against "wooden or reflexive" sentencing decisions, and as a form of additional punishment for uncharged crimes for which an enhanced sentence is mandatorily imposed without adequate constitutional safeguards. The obstruction of justice two level enhancement of §3C1.1 imposed upon Dunnigan to increase her basic guideline range from 51

months to 63 months was equated by the Circuit Court to a punishment for the additional crime of obstruction of justice without an indictment or trial and was constitutionally infirm without the minimal safeguards required by *Grayson*.

Although the Fourth Circuit stands alone in saliently declaring that §3C1.1 has an unconstitutional chilling effect on the Fifth Amendment right of a defendant to testify, four other Circuits[3] have arrived at the conclusion that obstruction of justice for false testimony enhancement based solely upon a jury verdict of guilty is impermissible. Not one Circuit has expressly upheld the application of the enhancement based solely upon a jury verdict. The accord between the Fourth Circuit and the other Circuits[4] which have addressed the propriety of relying solely

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[3] C.f. *United States v. Martinez*, 922 F.2d 914, 926 (1st Cir. 1991) (Obstruction of justice enhancement based upon jury verdict alone amounts to punishment for exercising right to testify in own defense.) *United States v. Husky*, 924 F.2d 223, 225 (11th Cir. 1991) (Independent finding of willful perjury necessary rather than relying solely upon jury verdict.) *United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir. 1992) (Court applauded independent clear-cut finding of perjury by the sentencing judge rather than relying upon jury verdict of guilty.) *United States v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991) (Obstruction of justice enhancement cannot be given solely because jury disbelieves defendant. District Court must make independent finding.) *United States v. Corn*, 956 F.2d 135, 136 (7th Cir. 1992) (Court should not automatically enhance sentence of defendant who takes the stand and is convicted.) *United States v. Lozoya-Morales*, 931 F.2d 1216, 1219 (7th Cir. 1991) (Imposing enhancement penalty automatically from a jury verdict impinges on right to testify in defendant's behalf.) *United States v. Davis*, 938 F.2d 744, 747 (7th Cir. 1991) (Found that District Court made independent finding of perjury and did not rely solely upon jury verdict in affirming enhancement.) *United States v. Ogbeifun*, 949 F.2d 1013, 1014 (8th Cir. 1991) (Upheld application of two level enhancement where District Court made independent determination of false testimony rather than defendant's inability to convince jury of his innocence.) *United States v. Contreras*, 937 F.2d 1191, 1194 (7th Cir. 1991) (Jury and District Court found defendant's story was a batch of lies and distinguishing application from *United States v. Lozoya-Morales*, 931 F.2d 1216, 1218-1220 (7th Cir. 1991)

[4] *United States v. Martinez*, 922 F.2d 914, 926 does hold that an enhancement based upon a jury verdict alone amounts to punishment for testifying in one's own behalf.

upon the jury verdict to apply the enhancement ends on the issue of whether the enhancement can be implemented without infringing upon the Constitutional right to testify in one's own defense.

If the issue presented in this case is confined to whether the §3C1.1 guideline was properly applied to Dunnigan, there is little doubt that the enhancement is violative of *Grayson's* prohibition against "wooden or reflexive" reliance upon a guilty verdict and is inconsistent with the First, Seventh, Eighth, and Eleventh Circuits application of §3C1.1 in *United States v. Martinez*, 922 F.2d 914 (1st Cir. 1991); *United States v. Lozoya-Morales*, 931 F.2d 1216, 1218-1220 (7th Cir. 1991); *United States v. Contreras*, 937 F.2d 1191, 1194 (7th Cir. 1991) *United States v. Davis*, 938 F.2d 744, 747 (7th Cir. 1991); *United States v. Corn*, 956 F.2d 135, 136 (7th Cir. 1992); *United States v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991); *United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir. 1992); *United States v. Ogbeifun* 949 F.2d 1013, 1014 (8th Cir. 1991) and *United States v. Husky*, 924 F.2d 223, 225 (11th Cir. 1991).

The district court made no independent findings of fact and obviously placed great weight on the jury verdict in determining Dunnigan had testified falsely at trial and that a two-level enhancement was appropriate by summarily stating, J.A. 29:

> The court finds that the defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when *it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy* alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels. [Emphasis Added]

The expressed finding of the Court was that Dunnigan made a general denial of her participation in the conspiracy and that it

was clear from the jury's finding beyond a reasonable doubt she had testified falsely. There is no reference in the record to specific false testimony or that the sentencing judge weighed the testimony and reached an independent conclusion of perjury.

A similar assessment of untruthful testimony was held to be an unlawful impingement upon the right to testify in one's own behalf in *United States v. Lozoya-Morales*, at p. 1218-1220, where the district court made the following finding at the sentencing hearing for defendant Sanchez:

> [Y]our argument is that anytime a defendant takes the stand and is found guilty, that he'll be found to have perjured himself. It may very well be true, but I'm not sure that there's anything wrong with that. If a defendant gets up on the stand and gives a story that the jury does not believe, the jury is finding that he is not telling the truth. I'm punishing him for testifying untruthfully. The jury found that he testified untruthfully because they believed that he had in fact been involved in the distribution of cocaine. *id.* at 1218.

In reviewing the imposition of the enhancement, the Seventh Circuit noted that the absence of an independent finding of untruthfulness was a "wooden or reflexive" application not authorized by *Grayson*. Notably in *Lozoya-Morales*, co-defendant Morales' obstruction of justice enhancement was upheld by the Court when it found Morales had committed perjury by the sentencing judge's statement on the record, 'I believe that if you get up on the stand and lie about your involvement, that is an obstruction of justice and I believe that Mr. Morales did lie about his involvement. *Lozoya-Morales* i.d. at 1220.

Arguably, the district court's determination of perjury in this case falls some place between the two separate determinations relative to Sanchez and Morales in *Lozoya-Morales*, but as the Seventh Circuit noted at page 1220, "[A]mbiguities we shall resolve against the sentence." At best, the district court's deter-

mination of false testimony is ambiguous, and it is evident that the jury verdict of guilty carried substantial weight in the Court's determination.

The cursory manner by which the sentencing judge arrived at the determination of perjury is exactly what the Fourth Circuit perceived as the basis for the lack of meaningful judicial review of the court's sentencing decision when the jury verdict becomes a substantial factor in the sentencing process. There was no way for the court of appeals to review whether Dunnigan concocted a fairy tale or a cock and bull story or whether she told a plausible story that was disbelieved by the jury. It is conceivable that the jury believed none or all of Dunnigan's testimony except a small portion. Likewise, the absence of specific findings of perjury did not provide the court of appeals with a basis to review whether the district court properly resolved any conflicts in testimony in a light most favorable to the defendant as required by Application Note 3 of the Sentencing Guidelines.

It also can reasonbly be inferred from the government's position in oral argument[5] that the jury verdict automatically triggered the sentencing court's decision rather than specific findings of fact which could have been referred to in the record.

The only conceivable way that this Court could uphold Dunnigan's sentence is to renounce that portion of *Grayson* which condemns a "wooden or reflexive" application of increased punishment for false testimony based solely upon a jury verdict. This would also naturally entail condoning vindictive and retributive punishment for exercising a constitutional right which has been condemned in *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969) and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The swing of the pendulum from rehabilitative to punishment goals has not reached the point where the constitutional prohibitions against vindictiveness and retribution are abrogated.

The government's brief avoids any discussion of whether Dunnigan was lawfully sentenced by the district court and

[5] Pet. App. 10a

confines its attack on the broad unconstitutionality holding by the Fourth Circuit. The government cannot assert in good faith that Dunnigan was lawfully sentenced and that her enhancement was imposed unless it is advocated that "wooden or reflexive" reliance upon a jury verdict is conclusive evidence of perjury and that the punishment goal of the sentencing guidelines justify vindictiveness and retribution.

B. THE FOURTH CIRCUIT PROPERLY DECLARED THAT §3C1.1 WAS UNCONSTITUTIONAL BECAUSE THE ENHANCEMENT CAN NOT BE APPLIED WITHOUT INFRINGING UPON THE FIFTH AMENDMENT RIGHT TO TESTIFY IN ONE'S OWN BEHALF DUE TO THE LACK OF ADEQUATE SAFEGUARDS.

At first blush, it appears that the court of appeals overreached the issue presented to it in this case by declaring the application of §3C1.1 unconstitutional, however, it carefully noted that it was "not satisfied that there are enough safeguards in place" to uphold the application of the guideline in question. Pet. App. p. 14a. The court of appeals did not extend its determination of unconstitutionality to exclude the possibility that additional safeguards against a chilling effect on the right to testify can be implemented or that the existing process can be adapted to provide adequate safeguards.

If there were ever an instance where a party's oral argument had a negative impact on the outcome of the case, it is obvious from the opinion where the Court stated:

> *The government maintained at oral argument*[6] *that every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement.* Certainly, if the guide-

[6] The government took an opposite position on its petition for a rehearing to the court of appeals and in its brief to this Court by repudiating but not denying the statement in oral argument before the court of appeals (Br. p. 26 Note 16)

lines are to be applied consistently, the government would be right. Nearly all testifying defendants tell a story that, if believed in full, would result in acquittal. The jury's verdict implies a disbelief of some material aspect of the defendant's testimony. Pet. App. 10a [Emphasis Added]

The government's position of automatic enhancement certainly initiated a perceptive analysis of an issue that has troubled the various Circuits which have attempted to wrestle with the following factors in determining the effect of a jury verdict of guilty on the application of §3C1.1 to enhance a convicted testifying defendant:

A. The government has the burden of proving an enhancement by a preponderance of the evidence[7];

B. If a jury finds a defendant guilty beyond a reasonable doubt and the defendant testified on a material issue, it is at the very least more probable than not that the defendant testified falsely[8]; and

C. The standard of reviewing the District Court's determination of whether there is a factual basis to apply the enhancement is on a "clearly wrong" basis[9].

It is an inescapable conclusion under the above legal framework, as the Court of Appeals noted, that government would be right in its position in oral argument that the guidelines enhancement automatically appended to the jury verdict, and that the reviewing court should uphold the imposition of the enhancement pursuant to the "clearly wrong" standard of review[10].

The court of appeals concluded that the guidelines lacked the

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[7] *United States v. Williams*, 905 F.2d 217, 218 (8th Cir. 1990) cert. denied, ____ U.S. _____, 111 S.Ct. 687 (1990)

[8] *United States v. Bonds*, 933 F.2d 152, 155 (2nd Cir. 1991)

[9] *United States v. Dunnigan*, 944 F.2d 178, 185, citing *United States v. Batista-Polanco*, 927 F.2d at 22; *United States v. Matos*, 907 F.2d at 276; *United States v. Wallace*, 904 F.2d at 605; *United States v. Beaulieu*, 900 F.2d at 1540; *United States v. O'Meara*, 895 F.2d at 1220.

[10] Pet. App. p. 10a.

appropriate safeguard of meaningful judicial review in reviewing the imposition of the enhancement based solely upon a jury verdict by stating:

> Of course, in light of the jury's verdict of guilty, the district court's finding will never be 'clearly wrong' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot. Our review of these enhancements would therefore be an empty ritual. Pet. App. p. 14a.

The court of appeals further expressed the opinion that the inclusion of the safeguard contained in United States Sentencing Guidelines Application Note 3[11], requiring the sentencing court to evaluate conflicting testimony in a light most favorable to the defendant[12], afforded no protection against an arbitrary application of the enhancement based upon a guilty verdict.

The diverse methods by which the various Circuits have dealt with the issue of reconciling the implications of the jury's guilty verdict with the prohibition against a "wooden or reflexive" application supports the court of appeals' unmanagebility conclusion.

The issue has been dealt with in the First, Seventh, Eighth and Eleventh Circuits by the additional requirement that the sentencing judge also make an independent finding that the testimony was material and willfully false. See *United States v. Husky*,

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[11] In this instance there is no indication that the district court applied Application Note 3 to the testimony or even considered any type of analysis.

[12] The "light most favorable" standard has been uniformly held to apply only in instances where the sentencing judge, after weighing the evidence has no firm conviction. See *United States v. Franco-Torres*, 869 F.2d 797, 801 (5th Cir.); *United States v. Beaulieu*, 900 F.2d 1537 (10th Cir. 1990); *United States v. Wallace*, 904 F.2d 603, 605 (11th Cir. 1990); *United States v. Matos*, 907 F.2d 274, 276 (2nd Cir. 1990); *United States v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States v. Barbosa*, 906 F.2d 1366, 1370 (9th Cir. _____) cert denied, ____ U.S. _____, 111 S.Ct. 394 (1991)

924 F.2d 223, 225; *United States v. Seabolt*, 958 F.2d 231, 233; *United States v. Willis*, 940 F.2d 1136, 1140; *United States v. Davis*, 938 F.2d 744, 747, and *United States v. Martinez*, 922 F.2d 914, 926. If the sentencing judge is required to exercise his or her independent judgment in making a separate determination of whether the defendant testified truthfully, the judge who concludes the defendant was truthful is also compelled to set aside the jury verdict. To do otherwise would fly in the face of traditional standards of judicial reasoning. On the other hand, if the court fails to apply the enhancement, but upholds the jury verdict, the denial of the enhancement is subject to an appeal by the government which will likely result in a reversal based upon the inconsistency of a guilty verdict and the finding of no perjury by the defendant[13].

The Eighth Circuit has attempted to resolve the dilemma presented by a jury verdict of guilty by compelling the sentencing judge to review the defendant's testimony under Application Note 1 pursuant to an objective standard of "... if a reasonable trier of fact could find the [defendant's] testimony true." *United States v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991) See also *United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir. 1992) Seemingly, the objective standard would enable a sentencing court to reconcile upholding the jury verdict but denying the enhancement.

Although, the objective standard appears to afford the defendant more protection against rigid application of §3C1.1, that was not the case in *United States v. Bonds* at 155 where the Court purportedly used an objective standard to uphold imposing the enhancement based upon a jury's guilty verdict:

> Here, by finding Bonds guilty of knowingly distributing counterfeit money, the jury necessarily determined that Bonds knew that the money he had distributed was counterfeit--that is, unless the jury's verdict was unsupported

[13] But *c.f. id.*

> by the evidence, in which case, of course, the remedy would be to reverse Bonds's conviction, not simply to disallow the two-level upgrade in sentencing. Because there is no indication that the judgment of conviction was invalid, it is clear that Bonds's testimony was objectively false. Moreover, inasmuch as the testimony concerned Bonds's own state of mind--a matter about which he was peculiarly knowledgeable--it is reasonable to conclude that Bonds was aware, at the time of testifying, that his statements were untrue. Accordingly, we affirm the two-level adjustment to Bonds's offense level.

Once more the unmanagability of the enhancement visualized by the Fourth Circuit is evident regardless of the standard utilized by the sentencing judge.

The objective standard established by the Eighth Circuit in *Willis* has been rejected in the District of Columbia Circuit in *United States v. Thompson*, 962 F.2d 1069, (D.C. Cir. 1992), where the defendant contended that a "no reasonable trier of fact" standard should be used, the court adhered to the subjective standard by stating:

> To limit enhancements only to cases of internally contradictory testimony or flagrant lying--or to permit enhancements only when no reasonable trier of fact could have found other than that the defendant lied--would be merely to reward the polished prevaricator while punishing those less practiced in the art of deception. We do not think that the Guidelines contemplate this distinction between different degrees of willful lying.
> *id.* at 1071.

In rejecting the objective standard, the District of Columbia Circuit once again relied upon the "wooden or reflexive" application of the jury verdict by holding:

> When a jury has answered the first question by finding beyond a reasonable doubt that the defendant lied, and could not be convicted otherwise, it might be anomalous for the judge to sentence the defendant upon the basis of the jury verdict and yet to refuse to enhance the sentence for perjury merely because the judge entertains a doubt that the defendant lied.
> *id* at 1071.

Judge Wald's dissent in *Thompson* advocating an objective standard similar to the Eighth Circuit's holding in *Willis* notes the same unmanageable infirmities which led the Fourth Circuit to rule the application of §3C1.1 unconstitutional in this case. The dissenting opinion pointed out the necessity for the safeguards of a higher level of proof by the objective standard of whether any reasonable trier of fact could have believed the defendant would effectively insure that the "wooden or reflexive" nature of §3C1.1 does not infringe upon Fifth Amendment rights[14].

The Fourth Circuit makes no effort to propose any process by which §3C1.1 can be constitutionally applied because in this instance the district court did not attempt to either make a subjective or objective findings of perjury but merely relied on the jury verdict. There was no controversy before it warranting the appeals court providing guidance and direction to the district court. Likewise, the government makes no such proposal as to how the guideline may be constitutionally applied to Dunnigan or to testifying defendants in general other than relying upon the integrity of judges[15].

It is Dunnigan's position that her sentence was unconstitutional by any standards. If this Court chooses to provide guidance and direction to lower trial and reviewing courts, the dissenting opinion in *Thompson* and the Eighth Circuit's decisions in *Willis* and *Seabolt* balance the right of a sentencing court to punish perjury at trial with the Fifth Amendment right to testify in one's own defense so as to provide the adequate safeguards which the court of appeals found inadequate in this case.

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[14] Id at 1073 (Wald, J. dissenting)
[15] See Government Br. p. 27.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Sharon Dunnigan

August 1992